UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

Case No. 11-C-562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Case No. 11-CV-1011 JPS-DPW-RMD

Defendants' Brief in Support of Their Motion for Summary Judgment on Counts 2-6 and 8 As Alleged by the *Baldus* Plaintiffs, Counts 4 and 5 As Alleged by the *Baldwin* Intervenor-Plaintiffs and the Single Count As Alleged by the Consolidated *Voces De La Frontera* Plaintiffs

---

Table of Contents

Page

ARGUMENT

I. Political Gerrymandering (Counts 2, 4, 5 and 8)

In order to prevail on their political gerrymandering claims, plaintiffs and intervenor-plaintiffs bear the burden of doing what neither the U.S. Supreme Court, nor any other lower federal court or plaintiff has been able to do: identify a workable standard for determining when political gerrymandering is so extreme that it infringes upon plaintiffs' constitutional rights. The question is not whether there is a test for identifying whether politics influenced a districting plan—it always does and there is nothing unusual or wrong in this, constitutionally or otherwise. "[P]artisan districting is a lawful and common practice." *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality). The question is at what point political gerrymandering infringes on constitutional rights. And to answer that question, one must first develop a manageable, workable standard for identifying that point. The U. S. Supreme Court has yet to figure out *what* constitutional rights are implicated by extreme political gerrymandering let alone *when* those rights are implicated. As a result, political gerrymandering claims are "justiciable *in principle*, but also currently unsolveable." *Radogno v. Ill. State Bd. of Elections*, 2011 WL 5025251, at *6 (N.D. Ill. Oct. 21, 2011). In over a quarter century, no litigant has been able solve this problem; plaintiffs do no better here.

A. Counts 2, 4, 5 and 8 Are All Political Gerrymandering Claims

Although plaintiffs designate only one of their eight counts as a political gerrymandering claim (count 5), counts 2, 4, 5 and 8 all (taken as a whole) constitute a political gerrymandering claim.[1] If counts 2, 4 and 8 are not part of a political gerrymandering claim, then they are nothing; the allegations asserted in support of each of these counts do not support any other kind of claim within this Court's jurisdiction.

[1] Intervenor-Plaintiffs have asserted claims that are redundant with counts 4 and 5 of the Second Amended Complaint. *Int-Plts' Cmplt.*, dkt # 67. Thus, their claims are also challenged here.

Count 2 is titled "the legislation does not recognize local government boundaries" and in support of this claim, plaintiffs allege that "[t]he 2011 legislative districts unconstitutionally fail to minimize the splitting of counties and political subdivisions, ignoring Wisconsin's long-established policy to maintain their integrity." *Sec. Am. Compl*, dkt. # 58, ¶ 38. Count 4 is titled "Congressional Districts are not compact and fail to preserve communities of interest" and in support of this count, plaintiffs allege that certain federal congressional districts are not compact while others allegedly divide communities of interest. *Sec. Am. Compl*, dkt. # 58, ¶¶ 50-55. Count 8 is "[n]ew congressional and legislative districts are not justified by any legitimate state interest" and the supporting allegations charge that "[t]he state failed to take into account the well-established principles of compactness, maintaining communities of interest and preserving core populations from prior districts in establishing new district boundaries," and "[t]here is no apolitical state interest that justifies the new congressional and legislative districts." *Sec. Am. Compl*, dkt. # 58, ¶¶ 89, 92.[2]

The U.S. Constitution does not mandate compactness, core population retention, or community of interest retention in legislative or congressional redistricting; thus, a claim that a redistricting plan does not advance any of these interests does not state a claim under the U.S. Constitution. Moreover, although the Wisconsin Constitution does require that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. Finally, the Wisconsin

[2] Defendants of course dispute the merits of these allegations and will show at trial that 2011 Wisconsin Acts 43 and 44 ("Acts 43" and "44") set forth districts that are compact, do not unduly break up communities of interest and maintain core populations better than court drawn plans have done in the past.

Constitution provides no standards for *federal* congressional districts, and accordingly there can be no claim that Act 44 violates the Wisconsin Constitution.

1. The U.S. Constitution Does Not Mandate Compactness, Contiguity or Respect for Communities of Interest or Political Subdivisions

"[C]ompactness, contiguity, and respect for political subdivisions … are important not because they are constitutionally required—*they are not*—but because they are objective factors that may serve to defeat a claim [of unconstitutional redistricting]" *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (citing *Gaffney v. Cummings,* 412 U.S. 735, 752, n. 18 (1973) (emphasis supplied)).[3] These objective principles are simply legitimate goals that can be used to justify variances from perfect population equality. So long as states respect actual constitutional requirements, they are free to pursue their own priorities as they develop new legislative district maps. "[I]t is the province of the state legislature to determine and apply redistricting priorities, so long as they do not conflict with constitutional mandates." *Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1296 (D. Kan. 2002).

Because preserving compactness, contiguity, communities of interest and/or local government subdivisions are not federal constitutional mandates, *Shaw*, 509 U.S. at 647; *Gaffney,* 412 U.S. at 752, n. 18, there is no such thing as a viable, free-standing claim for lack of compactness, lack of contiguity or failure to maintain communities of interest or core populations under the U.S. Constitution. *See*, *e.g.*, *Gorrell v. O'Malley*, 2012 WL 226919 (D. Md. Jan. 19, 2012) ("dismiss[ing] with prejudice" a claim that alleged failure to preserve communities of interest because it "alleges no constitutional violation"). So plaintiffs have no claim that the mere lack of compactness, failure to maintain

[3] *See also Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1296 (D. Kan. 2002) (no constitutional right to have one's particular community of interest contained within single congressional district).

communities of interest or failure to maintain contiguous districts violates the U.S. Constitution.

2. This Court Does Not Have Jurisdiction To Decide Claims Based on Wisconsin Constitution, Art. IV, §§ 4 or 5

It is true that the Wisconsin Constitution mandates that state senate and assembly districts be compact, contiguous and that they respect local governmental boundaries (though it says nothing about *congressional* districts). *See* Wisconsin Const., Art. IV, §§ 4 or 5.[4] But the U.S. Constitution says this Court lacks jurisdiction to entertain any claim that these requirements have been violated.

"[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when-as here-the relief sought…has an impact directly on the State itself." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 117 (1984). A State's sovereign immunity extends to its agencies, *id.* at 100; *see, e.g.*, *Hirsh v. Justices of the Supreme Court of the State of Cal.,* 67 F.3d 708, 715 (9th Cir. 1995), and to "a suit against a state official in his or her official capacity" because such a suit "is no different than a suit against the State itself." *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989). Although a narrow exception to the general rule of sovereign immunity was carved out in *Ex parte Young*, 209 U.S. 123 (1908) permitting plaintiffs to seek certain prospective equitable relief against state officials for violations of federal law,[5] this exception does not extend to claims alleging violations of state law by state officers. *Pennhurst*, 465 U.S. at 121; *Komyatti v. Bayh*, 96 F.3d 955, 959 (7th Cir. 1996).

---

[4] As noted above, the Wisconsin Constitution provides no contiguity, compactness, community of interest or local political subdivision related requirements for federal congressional districting. Accordingly, any allegations that Act 44, which governs Wisconsin's federal congressional districts, sets forth congressional districts that are insufficiently contiguous, insufficiently compact and/or improperly divides communities of interest or local political subdivisions does not state a claim under the Wisconsin Constitution.

[5] The Eleventh Amendment does not bar suits against a state official when the suit seeks prospective injunctive relief to "end a continuing violation of federal law," something not present here. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour,* 474 U.S. 64, 78 (1985)).

This rule is central to the principles of federalism: "It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. Therefore, federal courts "do not have authority to enjoin state officials from violating state law." *Froehlich v. Wis. Dep't of Corrections*, 196 F.3d 800, 802 (7th Cir. 1999). Instead, where a plaintiff seeks relief for such a breach of state law, they must present their claims in state court. *See, e.g.*, *Shegog v. Bd. of Educ. of City of Chicago*, 194 F.3d 836, 838 (7th Cir. 1999).[6] The mere fact that the state law questions may be pendant to federal law questions is of no consequence: "[N]either pendant jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Pennhurst*, 465 U.S. at 121.

A state's sovereign immunity is not simply a limitation on specific forms of relief; it is a jurisdictional bar and it "applies regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. at 100. It applies not only to claimed breaches of state statutory requirements, but also to claimed breaches of the state's constitution, *see, e.g.*, *Bricklayers Union Local 21 v. Edgar*, 922 F. Supp. 100, 109 (N.D. Ill. 1996), and to complaints seeking only declaratory judgment. *See, e.g.*, *Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991).

Because this Court does not have jurisdiction to hear a claim that either Act 43 or 44 violates the Wisconsin Constitution, and because lack of compactness, contiguity, respect for communities of interest or respect for political subdivisions does not state a free-standing claim for a violation of the U.S. Constitution, counts 2, 4 and 8 must either be dismissed for failure to state a claim on which relief can be granted and lack of jurisdiction, or construed, along with count 5, as claims charging political gerrymandering—and then be dismissed for the reasons set forth below.

---

[6] "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99 (emphasis in original).

B. Political Gerrymandering Claims Are Only Justiciable in Theory

Plaintiffs are no doubt eager to categorize their claims as something other than political gerrymandering given the state of the law governing such claims. Any discussion about the viability of political gerrymandering claims must start with the three seminal cases of *Davis v. Bandemer*, 478 U.S. 109 (1986), *Veith v. Jubelirer*, 541 U.S. 267 (2004) and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). The net result of these cases is that political gerrymandering claims remain justiciable only in theory and any party attempting to make out a viable claim faces a burden that at least four U.S. Supreme Court justices have determined is impossible to meet: identify a standard for assessing such claims that is both judicially discernible (relevant to a constitutional violation) and manageable in its application. Plaintiffs propose no standard that even attempts to solve this perplexing conundrum.

1. *Davis v. Bandemer*

Bandemer was the first of a trio of seminal opinions in which the Supreme Court considered whether a claim of political gerrymandering presents a justiciable controversy, or instead a nonjusticiable political question. 478 U.S. at 119-27. Among the historically recognized circumstances that might lead to the conclusion that an issue presents a non-justiciable political question are "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving it." *Id*. at 121 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

A majority of the Court (5 justices) found that an excessively partisan gerrymander would present a justiciable controversy; however, they could not agree on what standards would govern. *Id*. at 121-31, 138-41, 161-78.[7] A four-justice plurality articulated a two- part test for determining whether political influence on a redistricting

[7] The three other justices concluded that political gerrymandering claims presented non-justiciable political questions. *Id*. at 144-61.

plan violated the Equal Protection Clause. *Id*. at 119-27. Under this test, a plaintiff would need to prove both (1) "intentional discrimination against an identifiable political group" and (2) "actual discriminatory effect on that group." *Id*. Although the first element would prove easily met given the plurality's recognition that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended," *id*. at 130, the second element has proved unattainable.

In defining what kind of "discriminatory effect" would be sufficient to implicate equal protection rights, the plurality noted that prior jurisprudence had "clearly foreclose[d] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id*. at 130 (citations omitted). Reasoning that "[a]n individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district," *id*. at 132, the plurality held that for challenges to individual districts "th[e] inquiry focuses on the opportunity of members of the group to participate in party deliberations, in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate," *id*. at 133, while the inquiry applicable to statewide challenges "centers on the voters' direct or indirect influence on the elections of the state legislature." *Id*. at 133.

This four-justice plurality also rejected a multi-factor test, proposed by Justice Powell in dissent, under which factors such as the nature of the legislative proceedings, the intent behind the redistricting, the shapes of the districts and their conformity to local political boundaries and statistical evidence of vote dilution. *Id*. at 138. It reasoned that the proposed test suffered from the flaws that a redistricting plan could be found

unconstitutional with only a showing of partisan intent and no showing of consistent partisan disadvantage at the polls, *id*. at 138-39, that a redistricting plan could also be found to violate equal protection rights simply by virtue of a lack of proportionate election result, *id*. at 140, and that it too readily invites judicial interference into "the most political of legislative functions." *Id*. at 142-43.

2. Veith v. Jubelirer

For the next eighteen years, the holding in *Bandemer* "served almost exclusively as an invitation to litigation without much prospect for redress." *Vieth*, 541 U.S. at 267 (plurality) (quoting S. Issacharoff, P. Karlan & R. Pildes, The Law of Democracy 886 (rev. 2d ed 2002)). Rather than attempting to develop the elusive standard that the U.S. Supreme Court was unable to articulate, lower courts simply applied—or attempted to apply—the *Bandemer* four-justice plurality test with the nearly invariable[8] result that courts refused to intervene. *Id*. at 279. Accordingly, in 2004, the U.S. Supreme Court reasoned that "[e]ighteen years of judicial effort with virtually nothing to show for it" justified revisiting the question whether political gerrymandering claims are justiciable. *Id*. at 281. Five justices agreed that neither the *Bandemer* plurality test, nor any other test that had been proposed, set forth a workable standard for evaluating political gerrymandering claims. *Id*. at 281-301 (four justice plurality); 308 (one justice concurrence noting agreement with plurality's demonstration of all tests proposed to date).

However, these five justices split 4-1 on the question of whether anyone *ever* could come up with a judicially discernible and manageable standard for identifying when a political gerrymander is so severe that it is *per se* unconstitutional. The four justice plurality held that it was an impossible task, *id*. at 306, while Justice Kennedy, concurring and acknowledging that the plurality had correctly demonstrated the

[8] In a single case, preliminary relief was granted but it did not involve the drawing of district lines. *Veith*, 541 U.S. at 279-80.

shortcomings of the other standards considered to date, refused to foreclose the possibility that such a standard might be discovered in the future. *Id*. at 311.[9]

Although Justice Kennedy acknowledged that he himself could not figure out what the appropriate standard ought to be, he outlined the parameters a standard would need to meet in order to qualify: "[I]n another case[,] a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion)." *Id*. at 312. Yet he acknowledged that "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, [there is] no basis on which to define clear, manageable and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id*. at 307-08. The burden of both identifying those substantive principles and coming up with manageable and politically neutral test rest with the party asserting a political gerrymandering claim. *Id*. at 313. In this case, that is the plaintiffs.

Because any plaintiff attempting to pursue a political gerrymandering claim must come up with an appropriate test, the various and sundry reasons for the Court's rejection of so many previously proposed standards remain highly relevant to an analysis of a new proposed test. The four justice plurality, plus Justice Kennedy in concurrence, found each of the following tests to be improper for the following reasons:

The *Bandemer* Four-Justice Plurality Test: The two-part "intent plus effect" test in *Bandemer* was rejected because the second element had proven to be unmanageable over time. *Id*. at 282-84 (citing long line of lower court opinions and law review articles chronicling the legacy of "puzzlement and consternation" of the *Bandemer* plurality test).

[9] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United State*, 430 U.S. 188, 193 (1977). Accordingly, Justice Kennedy's concurrence on this point is controlling.

Vieth Appellants' Proposed Test: The test proposed in *Vieth*, which was comprised of a "predominant intent" first prong and a second prong which tested for partisan effect using a two-part test which would be satisfied when "'(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party voters and (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of the vote into a majority of seats,'" *id*. at 286-87 (quoting appellants' brief), was rejected as both unmanageable and not judicially discernible. *Id*. at 284-90.[10]

Although the "predominant intent" standard is used to test for racial gerrymandering, the Court held that the standard did not readily translate to political gerrymandering:

> Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it.… [T]he fact that partisan districting is a lawful and common practice means that there is almost always room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering.

Id. at 286. The proposed effects test was also rejected for a number of reasons, one of which is that it didn't actually test for a constitutional violation, *see id*. at 288 (constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups"), and another of which was that the standard was deemed unworkable given the near impossibility of identifying voter political affiliation on a state-wide basis; using past statewide election results was held insufficient

[10] Although the proposed test was loosely based on standards developed under the Voting Rights Act, the Court noted numerous substantive difference between racial and political gerrymandering that rendered improper attempts to coopt standards from the racial discrimination context: political persuasion is not always readily discernible, it is not always static and most critically, it is not a suspect classification under the Equal Protection clause and therefore, it does not trigger strict scrutiny analysis. *Id.*

as it would require adherence to the fiction that the only factor determining voting behavior is political affiliation. *Id*. at 288-89.

Powell *Bandemer* Test: The test proposed by Justice Powell in his *Bandemer* dissent, which was described as "essentially a totality-of-the circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far—or in Justice Powell's terminology, whether it is not 'fair,'" was again rejected as insufficiently definite. *Id*. at 291 ("[s]ome criterion more solid and more demonstrably met than that seems … necessary to enable the state legislatures to discern the limits of their districting discretion").

Stevens Dissent Test: Justice Stevens' proposal—that challenges to individual districts[11] could be evaluated on principles derived from the racial gerrymandering context—was rejected again based on the reasoning that co-opting racial gerrymandering standards is not appropriate because they are premised on the strict scrutiny triggered by the use of racial classifications; in contrast, political classifications are not constitutionally suspect and as such, their use does not trigger strict scrutiny. *Id*. at 293 ("[s]etting out to segregate voters by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn't go too far) lawful and hence, ordinary"). It was also rejected because it did not actually test for constitutional harms: "[T]he mere fact that there exist standards which this Court could apply … does not mean that those standards are discernible in the Constitution[;] [t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to Constitutional harms." *Id*. at 294-95.

[11] Justice Stevens found that the appellants lacked standing to make out a state-wide political gerrymandering claim. *Id*. at 328, 331-35.

Souter Dissent Test: In his dissent, Justice Souter, with whom Justice Ginsberg joined, set forth a five-part burden shifting test.[12] Although the Court acknowledged that a five-part test would seem at first blush to be "eminently scientific," it found the last four steps of the test require "a quantifying judgment that is unguided and ill suited to the development of judicial standards." *Id*. at 296. The proposed test would have courts evaluate whether the legislature disregarded traditional redistricting principles without specifying how much disregard would suffice; courts would be tasked with analyzing the correlations between deviations from traditional principles and the distribution of the allegedly disadvantaged political group without specifying how many correlations would be enough; and the test would require courts to determine whether there was an intent to "pack and crack" the group without specifying how many legislators must have had this intent or whether this intent needs to be a predominant intent, an exclusive intent or simply some form of intent. *Id*.

Moreover, no guidance was provided regarding how the five factors were to be weighed—instead, Justice Souter proposed allowing lower courts to work it out on a case by case basis. *Id.* at 348-49. The Court rejected this proposal, noting "the devil lurks precisely in such detail[;] [t]he central problem is determining *when* political gerrymandering has gone too far." *Id*. at 296 (emphasis added). "It does not solve that problem to break down the original unanswerable question (How much political motivation and effect is too much?) into four more discrete but equally unanswerable questions." *Id*. at 296-97. Finally, the Court also again noted that Justice Souter's

[12] "Under Justice Souter's proposed standard, in order to challenge a particular district, a plaintiff must show (1) that he is a member of a 'cohesive political group'; (2) 'that the district of his residence ... paid little or no heed' to traditional districting principles; (3) that there were 'specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group'; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that 'the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group.'" *Veith*, 541 U.S. at 295-96. "When those showings have been made, the burden would shift to the defendants to justify the district "by reference to objectives other than naked partisan advantage." *Id*. at 296.

proposal, too, suffered from a lack of judicial discernibility: "[w]e do not know the precise constitutional deprivation his test is designed to identify and prevent." *Id*. at 297

Breyer Dissent Test: Justice Breyer concluded that the Court ought to be testing for "the *unjustified* use of political factors to entrench a minority in power." *Id* at 356-60. However, instead of offering a test for measuring whether this standard has been met, he offered a list of "indicia of abuse" and provided three example scenarios, one of which, he indicated *would* amount to an unconstitutional political gerrymander, while the other two simply *could*; no indication is given as to what might tip the scales in the latter two scenarios. *Id*. at 365-66. The Court found fault with both the indicia and scenarios: "Each scenario suffers from at least one of the problems we have previously identified, most notably the difficulties of assessing partisan strength statewide and ascertaining whether an entire statewide plan is motivated by political or neutral justifications." *Id*. at 300. In sum, the Court concluded "we neither know precisely what Justice Breyer is testing for, nor precisely what fails the test." *Id*.

3. *League of United Latin American Citizens v. Perry*

Because five of the *Vieth* justices expressed belief in a theoretical, but undefined, justiciable political gerrymandering claim, plaintiffs have continued asserting such claims, although their efforts have invariably failed. Accordingly, two years after *Vieth*, the U.S. Supreme Court took up the political gerrymandering issue again in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). But this case did nothing to clarify the law. The Court declined to take up the justiciability issue and once again, there was no majority opinion regarding what would be an appropriate test.

Writing for a plurality of the Court, Justice Kennedy rejected the appellants' argument that mid-decennial redistricting solely motivated by partisan objectives should be held unconstitutional. *Id*. at 416-23. In so doing, he criticized the test for glossing over the distinction between the motive for the decision to redistrict and the motive for

each of the lines drawn and noted that "[e]valuating the legality of acts arising out of mixed motives can be complex…[and] [w]hen the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting." *Id*. at 417-18. Even more fundamentally, Justice Kennedy noted that the proposed test ignored one half of the equation: "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id*. at 418.

The U.S. District Court for the Northern District of Illinois recently summarized the current state of the law on political gerrymandering:

> [T]he point that we draw from these cases is that political gerrymandering claims remain justiciable in principle but are currently "unsolvable" based on the absence of any workable standard for addressing them. The crucial theoretical problem is that partisanship will *always* play *some* role in the redistricting process. As a matter of fact, the use of partisan considerations is inevitable; as a matter of law, the practice is constitutionally acceptable. The relevant question is not whether a partisan gerrymander has occurred, but whether it is so excessive or burdensome as to rise to the level of an actionable equal-protection violation. How much is too much, and why?

Radogno v. Illinois State Bd. of Elections, 2011 WL 5868225, *2 (N.D. Ill. 2011) (emphasis in original; citations omitted).

C. Plaintiffs' "Least-Change" Theory is Not a Workable, Judicially Discernible Standard For Identifying Unconstitutional Political Gerrymandering

Although plaintiffs failed to articulate a standard by which they propose political gerrymandering claims ought to be measured in their Second Amended Complaint, and thus their claims ought to be dismissed on this basis alone, *Vieth*, 541 U.S. at 313 ("appellants' complaint alleges no impermissible use of political classifications and so states no valid claim on which relief may be granted") (Kennedy, J., concurring), they did propose a "least change" standard in responding to Intervenor-Defendants' Motion for Judgment on the Pleadings:

> Plaintiffs propose a burden-shifting standard triggered by the state's imposition of new boundaries that move significantly more people than necessary to cure population imbalances. The objective fact of excess movement, if not unjustified by traditional redistricting criteria, puts the burden on defendants to offer more than a purely partisan justification for moving so many people, especially where doing so divides communities of interest.

Plts.' Br. In Opp. To Mot. For Judg. On Pleadings, dkt. # 105, at 3-4. This proposed test fails on nearly every level. *See generally Intervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16.

1. Plaintiffs' "Least Change" Test is Not Judicially Discernible

The most glaring error with plaintiffs' proposed "least change" test is that it is not judicially discernible—it does not test for or identify constitutional violations. "[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must … show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418 (Kennedy, J., plurality opinion).

Plaintiffs have made no effort to even identify what representational rights[13] they believe are compromised when a person is moved from one district to another. As explained by the intervenor-defendants, "[t]he plaintiffs make no effort to say what makes the old lines sacrosanct[;] [i]ndeed, nothing in the United States Constitution requires that the new Congressional district be 80% or 90% identical to the old ones or gives any voter in Whitefish Bay the right to forever live in the 5th Congressional District, rather than to find his or her village now located in the 4th." *Intervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 4. There is simply no basis for a legal presumption that being in one district rather than another compromises a voter's power to influence the political process.[14]

---

[13] Representational rights relate to an individual's opportunity to register, vote, participate in party deliberations and in slating or nominating of candidates and to engage in other activities that directly influence the election returns and can be used to secure the attention of the winning candidate. *Bandemer*, 478 U.S. at 133 (plurality).

[14] Plaintiffs make a fleeting attempt to tether their political gerrymandering claim to the First Amendment, rather than the Equal Protection clause. Plts.' Br. In Opp. To Mot. For Judg. On Pleadings, dkt. # 105, at

Not only does plaintiffs' proposed standard fail to test for any infringement on representational rights, it doesn't even test for political gerrymandering. Although Justice Kennedy noted that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), surely a political gerrymandering claim must at a minimum start there. *See Vieth*, 541 U.S. at 286 (key issue is "whether [a plan] is so substantially affected by an excess of an ordinary and lawful motive as to invalidate it"). Plaintiffs' standard does not even point to the existence of an unlawful motive, much less an excess of it: they propose measuring whether political motivations are excessive using a test that does not require a showing of any political motivation at all. Further, plaintiffs' test completely fails to test for partisan effect. *See Bandemer*, 478 U.S. at 138-39 (rejecting Powell dissent test on the ground that it would allow redistricting plan to be found unconstitutional without any showing of partisan disadvantage).

Without saying so, plaintiffs appear to assume that if legislative discretion is curtailed, the net result will be legislative districts that are less likely to benefit one political party over the other. But their test would not necessarily minimize partisan

---

19-21. They premise this effort on dicta from Justice Kennedy's concurrence in *Vieth* indicating that the First Amendment may provide a basis on which a political gerrymandering standard might be based. *Id*. at 19-20 (quoting *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring)). However, Justice Kennedy was alone in expressing this sentiment and this expression was not part of the narrowest grounds for the judgment and thus, not controlling. *See Marks,* 430 U.S.at 193. To the contrary, the four-justice plurality rejected the notion nearly out of hand. *Vieth*, 541 U,S, at 293 ("[o]nly an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs").

But even were there more solid legal footing for plaintiffs' argument, the specific theory they propose is founded on an improper mishmash of First Amendment principles. The thrust of plaintiffs' First Amendment theory is that "[a] political candidate with less chance of winning an election will usually receive less in campaign contributions, a form of political speech, than a candidate with a greater chance of winning[;] [a]ccordingly, the new districts impair the ability of Democratic candidates or donors to raise campaign contributions and thereby engage in political speech." *Sec. Am. Compl*., dkt. # 58, at ¶ 67. This does not identify a burden on or impairment of a constitutionally protected right but rather simply asserts that the legislation (arguably) could impact donor's motivation to exercise such rights. If plaintiffs were correct that any legislation that might impact a campaign donor's motive to make a contribution could give rise to a strict scrutiny First Amendment challenge, there would be no legislation in this country safe from such an attack.

advantage so much as call for a constitutional mandate that any partisan advantage incorporated in the most recent districting scheme be forever entrenched. Plaintiffs offer no explanation why redistricting plans adopted after the 2000 census should be regarded as some kind of paragon of neutrality that ought to forever be preserved. If a highly partisan map were enacted shortly after the 2000 census, plaintiffs' test would almost certainly bar a 2010 plan aimed at neutralizing this past partisan advantage. Plaintiffs' proposed test rests on the erroneous legal proposition that core retention is a constitutional mandate. It isn't—not under the U.S. Constitution nor under the Wisconsin Constitution. *Shaw*, 509 U.S. at 647; Wisconsin Const., Art. IV, §§ 4-5.

In proposing a standard that could describe an unconstitutional gerrymander without evidence of either unconstitutionality or a political gerrymander, plaintiffs appear to have been guided not by constitutional standards but by what they thought they might be able to prove later. In this case, the legislative districts are not especially partisan, and knowing this[15] plaintiffs propose a threshold that is even less constitutionally-related than all those previously proposed and rejected. "[T]he mere fact that there exist standards which this Court could apply … does not mean that those standards are discernible in the Constitution[;] [federal courts] may not willy-nilly apply standards—even manageable standards—having no relation to Constitutional harms." *Vieth*, 541 U.S. at 294-95. Plaintiffs' proposed "least change" test fails for the simple reason that it has no relation to any Constitutional harm.

2. Plaintiffs' "Least Change" Test is Not Manageable

Not only must plaintiffs' proposed standard be rejected for its failure to test for violations of any recognized constitutional right, it also must be rejected as it is no more manageable than the multi-factor tests that the U.S. Supreme Court has rejected in the

[15] In their recent discovery production, intervenor-plaintiffs turned over an email reflecting that the initial reaction to the congressional redistricting plan of Democratic Representative Ron Kind's Chief of Staff was that "[t]he map isn't too unreasonable." PFOF No. 1.

past. Plaintiffs simply shoved most of the uncertainty and lack of precision into the second half of their test, which, conveniently for them, lands on the defendants.[16] Under their proposed test, the burden would shift to the defendants to justify any population changes beyond those necessary to cure population imbalances, "especially where [the change] divides communities and communities of interest." *Plts.' Br. In Opp. To Mot. For Judg. On Pleadings*, dkt. # 105, at 3-4.

But what are the legitimate factors that can be used to justify "unnecessary" shifts? How are they to be weighed? What happens in mixed motive situations? At what point is there too much political motive? If mixed motive situations are always constitutional, how is this test functionally different from the sole motivation tests the Supreme Court has rejected in the past? When district lines are moved more than is necessary to equalize populations, which lines were moved necessarily and which were moved unnecessarily?[17] What is the meaning of the "especially where doing so divides communities and communities of interest" clause plaintiffs have crafted? Will different standards apply in that situation? If so, what are they? Does the reference to "traditional redistricting criteria" in the test include political considerations in light of the U.S. Supreme Court's recognition that such considerations are both lawful and ordinary? *See Vieth*, 541 U.S. 293. If not, why not?

As the intervenor-defendants noted, plaintiffs proposed that expert witnesses will work out some of the details as to how this test would work objectively later. *Plts.' Br. In Opp. To Mot. For Judg. On Pleadings,* dkt. # 105, at 18, n. 7. However, expert witnesses

[16] Even the initial part of plaintiffs' proposed test is unmanageable as it requires a showing that new boundaries have moved "significantly" more people than necessary to cure population imbalances. Plaintiffs do not indicate how many people qualify as "significantly more."

[17] In the event that a district needs to lose 20,000 citizens, plaintiffs have indicated that the state can lawfully use politics in choosing whether to move people out to the north, south, east or west. *Id*. at 17. Assuming this is true, if the state has a political motive for moving 20,000 people out at a northern border but has non-political motives for moving out another 20,000 out via a western border and moving a different 20,000 in through an eastern border is this constitutional? If not, why is that same politically motivated 20,000 person shift on the northern border constitutional when not accompanied by a non-partisan shift elsewhere but suddenly converted into a constitutional violation when so accompanied?

are retained by the parties and will invariably not agree on what those legitimate and objective standards are. Moreover, if there really *are* such objective tests that expert witnesses will be able to apply in the future, they are noticeable by their absence from the plaintiffs' proposed standard. Despite plaintiffs protestations that their test is not a totality of the circumstances test, it inevitably is and it necessarily fails for the reasons that all prior totality of the circumstances tests have failed: it is simply not judicially manageable.

3. Plaintiffs' "Least Change" Test Violates The Allocation of Powers Set Forth in The Wisconsin Constitution

Finally, but equally important, is that plaintiffs' test, if adopted, would work an unprecedented shift in the locus of responsibility for legislative and congressional redistricting. "Redistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 565 U.S. ___, 2012 WL 162610, at *2 (Jan. 20, 2012) (quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975)). "That the federal courts sometimes are required to order legislative redistricting…does not shift the primary locus of responsibility." *LULAC*, 548 U.S. at 415 (plurality). Both the U.S. Constitution and the Wisconsin Constitution vest in the state legislature responsibility for legislative and congressional redistricting. U.S. Constitution, Art. I, § 4; Wis. Const., Art. IV, § 3.

The "least change" test that plaintiffs propose not only fails to test for constitutional violations, it would actually work a constitutional infringement by shifting an unwarranted degree of oversight to the federal judiciary. State legislatures have always been free to redistrict by drawing maps anew, bounded only by the limitations that it make a good faith effort to create districts of equal population and refrain from drawing lines in a manner that would violate the Voting Rights Acts. *See Prosser v. Elections Bd.*, 793 F.Supp. 859, 865 (W.D. Wis. 1992) (when reviewing legislative plan, courts role is limited to determining whether it is constitutional, not whether it is the best plan). "Least change" would effectively bar state legislatures from drawing maps anew

and would permit them to tweak the edges only insofar as the judiciary, in its unbounded discretion, deemed the changes "legitimate."

Although plaintiffs will no doubt attempt to deny it, the plan they have proposed subjects every detail of a legislative and congressional redistricting plan to judicial oversight and demands that states account to the federal judiciary for every move made: every shift must be justified by some judicially defined "legitimate" object, whether it be equalizing population totals or some other yet-to-be-defined legitimate purpose. Plaintiffs will no doubt protest that states able to avoid changing district lines more than necessary to accomplish population equality will not be subject to judicial review at all. But this situation is likely to prove rare and in any event, the argument misses the point. A standard that prevents a state legislature from exercising discretion constitutionally delegated to it on the front end is just as objectionable as a standard that curtails such discretion at a later point.

The constitutional allocation of powers confirms that the discretion of state legislatures to define where and why legislative districts are drawn is bounded only by the limitation that it not be used in a manner that violates individual constitutional or statutory rights. "Least change" flips this presumption and implies that state legislatures have no discretion in redistricting except insofar as the judiciary approves it. A test that too readily invites judicial interference into "the most political of legislative functions" is unwelcome and unacceptable, *Bandemer*, 478 U.S. at 143 (plurality) and "[a] decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Unless and until a court finds a constitutional or statutory violation, it has no constitutionally appropriate role in the redistricting process. *Perry*, 565 U.S. ___, 2012 WL 162610, at *5 ("[i]n the absence of any legal flaw in this respect in the State's plan, the District Court had no basis to modify that plan").

II. Voting Rights Act (Count 6)

Count 6 of plaintiffs' Second Amended Complaint claims that Act 43 violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Sec. Am. Compl*, dkt. # 58, ¶¶ 72-79. They say that (1) African Americans comprise a sufficiently large and geographically compact group to constitute a majority of the voting age population in seven assembly districts, but Act 43 creates only six, *id*., ¶ 76(b), and (2) Latino populations comprise a sufficiently large and geographically compact group to constitute a majority of the voting age citizens of one assembly district, but that Act 43 creates no such districts, *id*., ¶ 77(b). (The single claim asserted by consolidated plaintiffs, Voces de la Frontera, Inc., et al, is redundant with plaintiffs' Section 2 claim as it relates to the non-existence of an assembly districts with a Latino majority. *See Voces Compl*., dkt. #1, Case No. 11-cv-1011, ¶ 1, 27-33.)

The Supreme Court has established three "necessary preconditions" a minority group must show to make out a claim under Section 2 of the Voting Rights Act. A minority group must prove (1) that it is "sufficiently large and geographically compact to constitute a majority in a single-member district";[18] (2) that it is also "politically cohesive"; and (3) that the "white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed, . . . to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see also Growe v. Emison,* 507 U. S. 25, 40–41 (1993) (holding that these factors are required in Section 2 cases involving single-member districts).[19]

[18] To establish the first *Gingles* precondition, "plaintiffs typically have been required to propose hypothetical redistricting schemes and present them to the district court in the form of illustrative plans." *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009).

[19] In the event, but only in the event, that these three "necessary preconditions" are established may a court move on to the second part of the test for evaluating Section 2 claims—a "totality-of-the-circumstances" analysis to determine whether the plan impairs the ability of the minority voters to participate equally in the political process. *See Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

Plaintiffs cannot meet the first *Gingles* precondition with respect to their claim that Act 43 violates the Voting Rights Act by not creating a seventh African American majority assembly district. The plaintiffs' own expert admitted the African American population is not large enough to create a seventh majority-minority Assembly district:

> Q. Given your analysis of the six African American districts, is there a large enough minority population in that area to create a seventh African American majority-minority district?
>
> A. I don't believe there is.

PFOF No. 2. Plaintiffs' claim regarding the absence of a Latino majority district also necessarily fails as plaintiffs cannot meet the third *Gingles* precondition; there is no evidence that non-minority bloc voting usually thwarts election of the minority's preferred candidate. *Gingles*, 478 U.S. at 51.

A. The VRA claim relating to the African American Districts Fails Under The First *Gingles* Factor

Prior to the enactment of Act 43, Wisconsin's legislative districts were the by-product of a court-drawn map. PFOF No. 3; *Baumgart et al. v. Wendelberger et al.*, Case No. 01-C-0121 (E.D. Wis. 2002). Under that plan, there were two state senate districts with African American majorities (senate districts 4 and 6) and five assembly districts with African American majorities (assembly districts 10, 11, 16, 17 and 18). PFOF No.4. Under the court drawn plan, a sixth assembly district—assembly district 12—began the decade with a 32.77% African American voting age population and ended the decade at 48.99%, never quite reaching a majority African American voting age population. PFOF No. 5.

Act 43 shifted the lines of assembly district 12 to encompass additional African American voters, thereby creating a sixth African American Assembly District. PFOF No. 6. The following table illustrates the continued African American voting strength in

all of the Senate and Assembly Districts at issue and the improved strength in assembly district 12 as a result of Act 43:

African American Assembly District Voting Age Populations			
Assembly Districts	**2002 Under Court-Drawn Map**	**2010 At Time of Census**	**Under Act 43**
AD10	67.08%	67.43%	61.79%
AD11	62.85%	75.84%	61.94%
AD12	***32.77%***	***48.99%***	***51.48%***
AD16	60.45%	55.87%	61.34%
AD17	61.88%	74.11%	61.33%
AD18	56.70%	58.85%	60.43%

PFOF No. 7. Act 43 not only maintains the five majority African American Assembly Districts, but adds a sixth district as well. PFOF No. 8.

Plaintiffs claim that the Act violates Section 2 of the Voting Rights Act because it fails to create a seventh African American majority assembly district. *Sec. Am. Compl*, dkt. # 58, ¶ 76. But there is not, and never was, a factual basis for the plaintiffs' allegation that "African Americans comprise a sufficiently large and geographically compact group to constitute a majority of the voting age population in at least seven assembly districts." *Id*., ¶ 76(b); *see also* PFOF Nos. 2, 9-10. Plaintiffs' own expert, Dr. Kenneth Mayer, has concluded that two Senate Districts and six Assembly Districts that have a majority voting age African American population is the optimum result for purposes of African American voting strength. PFOF No. 9. Dr. Mayer's expert report notes that even if the African American population in assembly districts 10, 11, 16, 17 and 18 were to be reduced and redistributed so that each of the five districts had exactly 55% African American voting age population, "the numbers are not large enough to create a 7th majority-minority African-American Assembly district." PFOF No. 10.

Plaintiffs' inability to show that there ever could have been a seventh African American assembly district means that they cannot meet the first prong of *Gingles* and their claim should therefore be dismissed. Plaintiffs cannot identify a group "sufficiently large and geographically compact to constitute a majority in [an additional] single-member district." *Gingles*, 478 U.S. at 50. At best, the numbers may (or may not be) enough to create a separate "influence district," but this does not create a claim under the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (Kennedy, J.) (internal citations omitted).[20] Accordingly, count 6 must be dismissed with respect to the African American district allegations.

B. The VRA Claim Relating To The Absence Of A Latino District Fails Under The Third *Gingles* Factor

Act 43 also improves upon the 2002 court-drawn map with regard to the voting strength of Wisconsin's Latino population. Under Act 43, nearly a quarter of the entire Wisconsin Latino population is located within one heavily Latino-populated senate district, senate district 3, with the majority of the Latino population in assembly districts 8 and 9. PFOF No. 11. The 2002 court plan created only one majority Latino population assembly district, assembly district 8, with a total Latino population of 62.14% and a voting age Latino population of 58.34%. PFOF No. 12. The second largest Latino population district, assembly district 9, had a total Latino population of only 28.42% and a voting age Latino population of just 22.94%. PFOF No. 13. The table below shows the Latino population changes reflected by the 2010 census and how Act 43 made adjustments to improve Latino voter influence:

[20] "It is appropriate to review the terminology often used to describe various features of election districts in relation to the requirements of the Voting Rights Act. In majority minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, §2 can require the creation of these districts. At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that §2 does not require the creation of influence districts." *Bartlett v. Strickland*, 556 U.S. 1 (Kennedy, J.).

Latino Assembly District Voting Age Populations			
Assembly Districts	**2002 Under Court-Drawn Map**	**2010 At Time of Census**	**Under Act 43**
AD8	58.34%	65.50%	60.52%
AD9	***22.94%***	***46.18%***	***54.03%***

PFOF No. 14.[21]

Notwithstanding this, plaintiffs attempt to make out a claim under Section 2 of the Voting Rights Act based on how the line was drawn between assembly districts 8 and 9. However, their claim fails because they cannot show that non-minority bloc voting thwarts the election of their preferred candidate as required under *Gingles*. 478 U.S. at 51. Under the 2002 court plan, assembly district 8 has been continuously represented by a Latino member. PFOF No. 15. Under the 2002 court plan, assembly district 9 was continuously represented by the same non-Latino Assembly member since the plan was put in place. PFOF No. 16. Compared to the assembly district 9 created under the 2002 court plan, assembly district 9 under Act 43 provides an increased opportunity for the success of a candidate of choice of the Latino community, given the increase in the Latino population there. PFOF No. 14-16.

Plaintiffs ignore the Assembly election results and look to election contests in other areas. Their expert, Dr. Mayer, focuses on elections outside of assembly district 8 (including two state-wide elections and four county-wide elections) while excluding the very assembly races at issue. PFOF No. 17. But Dr. Meyer skips over a critical fact—the Latino candidate won a majority of those races. PFOF No. 18.[22]

[21] The plaintiffs, to the contrary, claim that the citizen voting age population in AD9 does not reach 50%.

[22] After expert deadlines passed and after expert reports were exchanged, plaintiffs attempted to remedy this problem by producing an "ecological inference run" relating to individual wards, or portions of wards, created in 2002 in the area that is now covered by assembly districts 8 and 9. PFOF No. 19. But that type of exogenous data should only be used if there is not sufficient data available from the actual district at issue. Looking to wards, or portions of wards, or aldermanic districts would only be necessary to the extent that there was no adequate information from the Assembly District itself. PFOF No. 20. Those aldermanic elections are non-partisan and pose particular problems for the election of minority candidates. PFOF No. 21.

Plaintiffs cannot show, as a necessary precondition to their Voting Rights Act claim, that non-minority voters are voting as a bloc to thwart the election of the Latino candidate in assembly district 8. *Gingles*, 478 U.S. at 51. Accordingly, Count 6 must be dismissed with respect to the Latino district claims, and the Complaint of the consolidated *Voces De La Frontera* plaintiffs must be dismissed as well.

III. Delayed Voting (Count 3)

Plaintiffs' third claim is that Act 43's "Legislative Districts Unnecessarily Disenfranchise 300,000 Wisconsin Citizens." *Sec. Am. Compl*, dkt. # 58, Third Claim. Plaintiffs allege that voters who are shifted from even to odd senate districts "will face a two-year delay in electing their state senator; [t]hey are disenfranchised, unnecessarily and unconstitutionally, by being deprived of the opportunity to vote, as the Wisconsin Constitution requires, every four years for a senator to represent them." *Id.*, ¶ 45 (emphasis added).

This claim fails for several reasons: (a) the Wisconsin Supreme Court has rejected this type of claim (and the *Penhurst* doctrine bars it anyway); (b) it is based on case law vacated by the United States Supreme Court; and (c) under Act 43, the percentage of the population that will wait an additional two years between senate elections is lower than the percentage of the population delayed under the 1982, 1992, and 2002 court plans.

Reapportionment that causes such "delayed voting" does not violate the Wisconsin Constitution. The Wisconsin Supreme Court rejected this argument more than one hundred years ago:

> The complaint charges that the senate districts are so numbered in chapter 482 that large numbers of electors who were last permitted to vote for senators in 1888 cannot do so again until 1894, while other large numbers of electors who voted for senators in 1890 may again do so in 1892. This is alleged as a reason why the act is invalid. The court finds in the constitution no authority conferred upon it to interfere with the numbering of the senate districts. In that respect the power of the legislature is absolute.

State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 468, 51 N.W. 724 (1892).[23]

Plaintiffs rely on *Republican Party of Wisconsin v. Elections Board*, 585 F.Supp. 603 (E.D. Wis. 1984), *vacated* 469 U.S. 1081 (1984). But that decision is of no precedential value; it was vacated by the United States Supreme Court. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 577, n. 2 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect ...); A decision that has been vacated and remanded, with directions to dismiss, does not have "any legal consequences." *United States v. Munsingwear, Inc*., 340 U.S. 36, 38 (1950).

A brief history of the 1980s redistricting litigation is in order, and begins with *Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630, 659 (E.D. Wis. 1982). There, the court discussed the issue of delayed voting:

> We were mindful of the fact that the fall elections only call for the election of Senators presently holding odd numbered Senate seats. Consequently, the residents of Wisconsin presently living in even numbered Senate districts will not be electing Senators under our plan until 1984. To minimize the number of people affected by our plan as it relates to Senate districts, we have tried, as much as possible consistent with the principle of one person, one vote, to use even numbers for the Senate districts in our plan that roughly correspond to areas assigned to even numbered districts in the 1972 act.

Id. at 659.

Later, certain intervenors argued in a June 15, 1982 motion that the court plan contained "serious errors" because it delayed the voting opportunity for 713,225 Wisconsin residents. *Id*.; PFOF No. 39. Noting that the argument "may have some emotional appeal," the court nevertheless rejected it, calling it "a house of cards that collapses when exposed to even the gentle breeze of cursory analysis." *Id*. The court

[23] "At one time, Assembly districts which divided counties were held unconstitutional in Wisconsin except where a county was entitled to more than one state Representative." *Wisconsin State AFL-CIO v. Elections Bd*., 543 F.Supp. 630,635 (E.D. Wis. 1982) (citing *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 468, 51 N.W. 724 (1892)). Given the unacceptable population deviations that can be caused by the Wisconsin constitutional provisions relating to county lines, those constitutional provisions have been viewed as "nugatory." *Id*. (citing 58 Op. Atty. Gen. 88 (1969)).

found the argument to be contrary to Wisconsin law (citing an opinion of the Wisconsin Attorney General) and contrary to "common sense." *Id.*[24]

The Wisconsin Legislature enacted a new redistricting plan via 1983 Wisconsin Act 29, and in a subsequent opinion the court reiterated that the "temporary disenfranchisement that occurred in Wisconsin under the '82 Court Plan (the result, of course, would have been the same if the Legislature had acted in '82) did not run afoul of the Constitution." *Republican Party*, 585 F.Supp. at 606. The court found the *additional* "temporary disenfranchisement" of 173,976 people—that is, on top of those delayed by the court's earlier plan—to be impermissible. *Id*. at 605-606. The court said, however, that "had the Legislature enacted a reapportionment plan similar to its '83 effort before the November 1982 elections, we would have no trouble sustaining its validity against a constitutional challenge." *Id*.

This is largely academic, because the U.S. Supreme Court soon entered a stay of the court's ruling and the 1983 Legislative plan went into effect. *See* Docket, Case No. 82-C-0113 at Nos. 122-126. The Supreme Court ultimately vacated the *Republican Party* decision and ordered that the case be dismissed. *Id.* The court's opinion in *Republican Party* is, in fact and in law, a nullity. *Republican Party* was decided on May 25, 1984 by the three-judge panel; five days later the Wisconsin Elections Board appealed to the U.S. Supreme Court. *Id*., Dkt. Nos. 117, 122. The matter was referred by Justice John Paul Stevens to the Court, and by order dated June 8, 1984, the Court stayed the mandate of the three-judge panel. *Id*., Dkt. No. 123. The Supreme Court then denied a motion to vacate the stay. *Id*., Dkt. No. 124. Soon thereafter, the Supreme Court vacated the

[24] The court nevertheless assigned different numbers to a number of Senate districts, noting that some corrections could be made, and included numbering changes requested by other parties to make the plan "more consistent with the numbering system used in 1972." *Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630, 659 (E.D. Wis. 1982). The decision itself does not identify the ultimate number of delayed voters caused by the final renumbering, but contemporaneous news articles indicate that the 1982 court plan ultimately would have delayed 529,293 persons. *See* Ron Elving and Margo Huston, "La Follette plans quick appeal on redistricting," *Milw. Journal*, May 27, 1984, at A1, A12; PFOF No. 40.

judgment itself, and ordered the three judge panel to dismiss the case. *Id*., Dkt. Nos. 125-126. *See also Wisconsin Elections Bd. v. Republican Party of Wisconsin*, 469 U.S. 1081 (1984).

The Supreme Court's order meant that the maps drawn by the Legislature—not the maps drawn by the three-judge panel—were used in the Fall 1984 elections for all 99 State Assembly seats and 17 State Senate seats. *See* "Ruling against redistricting set aside by Supreme Court," *Wisconsin State Journal*, at Section 4 and Page 5, December 11, 1984 (noting that the three-judge panel's opinion relating to delayed voting had been nullified by the Supreme Court, and that the Legislature's maps were always used); "Court OKs Dem remap," *Wisconsin State Journal*, June 8, 1984 at 1. The Legislatively drawn maps—reflected in 1983 Wisconsin Act 29—governed all elections in the State. *See* Wisconsin Blue Book 1985-1986 at pg. 300 ("Prior to the enactment of 1983 Wisconsin Act 29, legislative districts were reapportioned by order of the U.S. District Court for the Eastern District of Wisconsin, June 17, 1982 .... Since July 1983, Wisconsin Act 29 has governed all legislative elections.").[25]

The delayed voting under both the 1982 court plan and the 1983 Legislative plan is not extraordinary. In 1992, the court plan moved 257,000 people (approximately 5.25 % of the population) into districts where they would wait six years for an opportunity to vote for state senator. PFOF No. 22. In 2002, the court plan moved 171,163 people (approximately 3.14 % of the population). PFOF No. 23. Act 43 appeared initially to cause a six-year wait for 299,704 persons (5.26% of the population). PFOF No. 24. Some 164,843 of those, however, live in districts where a special election was held in

[25] The 1983 Legislative maps were introduced via Assembly Bill 1 on July 11, 1983. PFOF No. 28. A single public hearing was held that same day. *Id*. The Democratic Assembly passed the bill on July 13, the Democratic Senate did so on July 14, and the Democratic Governor signed it into law on July 15. *Id*. The Governor vetoed an earlier plan that was inserted into the state budget bill by the Democratic caucus—without public hearing—four weeks prior. PFOF No. 38.

2011, and therefore only 134,845 persons (2.37 % of the population) will be subject to a six-year wait. PFOF No. 25.

This 2.37 % of the population that will wait an additional two-years between senate elections under Act 43, therefore, is lower than the percentage effected by the 1982, 1992, and 2002 court plans.[26] It is also lower than percentages advocated in 2002 by Plaintiffs' current expert, Professor Mayer, who supported four different maps that had proportionally greater delayed voting (from 5.27 % - 5.67% of the population) than does Act 43. PFOF No. 26. And it compares favorably with plans enacted in other states this redistricting cycle—including Oklahoma, Oregon, Ohio, Missouri, and California—which range from 3.02% in Oregon to 10.66% in California. PFOF No. 27. Accounting for the 2011 special elections, Wisconsin actually has a lower percentage of delayed voters than any of these other states. *See id*.

CONCLUSION

For the foregoing reasons, defendants are entitled to judgment as a matter of law on the *Baldus* plaintiffs' counts 2-6 and 8, the redundant counts 4 and 5 of the intervenor *Baldwin* plaintiffs and the single count of consolidated *Voces De La Frontera* plaintiffs. Counts 2, 4, 5 and 8 are political gerrymandering claims which necessarily fail as plaintiffs have failed to identify a workable, judicially discernible standard for evaluating them. Count 6 necessarily fails with respect to the alleged absence of a seventh African-American majority assembly district under the first *Gingles* factor while the third *Gingles* factor dooms it with respect to the alleged absence of a Latino majority district. Accordingly, the *Voces De La Frontera* claim fails as well. Count 3 fails as it is both unsupported under the law and unsubstantiated by the facts.

[26] The fact that court-drawn maps cause similar delays is not surprising. "Courts that have addressed equal protection claims brought by voters who were temporarily disenfranchised after a reapportionment have consistently applied rational-basis review." *Donatelli v. Mitchell*, 2 F.3d 508, 515 (3rd Cir. 1993); *accord Republican Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir. 1992) (holding that a temporary dilution of voting power that does not unduly burden a particular group does not violate the equal protection clause).

Dated this 10th day of February, 2012.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lazarms@doj.state.wi.us

J.B. VAN HOLLEN
Attorney General

MARIA S. LAZAR
Assistant Attorney General
State Bar #1017150

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

/s/ Daniel Kelly
Patrick J. Hodan
WI State Bar ID No. 1001233
phodan@reinhartlaw.com
Daniel Kelly
WI State Bar ID No. 1001941
dkelly@reinhartlaw.com
Colleen E. Fielkow
WI State Bar ID No. 1038437
cfielkow@reinhartlaw.com
Attorneys for Defendants

REINHART\8330870